RULE 16—Pre-Trial Conference on Application

After the note of issue is filed and before the action appears on a pre-trial call calendar, the pre-trial judge, on written notice and for good cause shown, may set the action for a pre-trial conference for a day certain, and the clerk shall thereupon mail a notice of the conference to the attorneys of record, which shall include the information required to be given the attorneys by Rule 15 (b).

RULE 17—Pre-Trial Conferences

(a) All pre-trial conferences shall be held before a pre-trial judge in open court or in chambers, with the clerk and an official court reporter present. The attorneys appearing at the pre-trial conference shall be prepared to discuss the action and shall be authorized to act for their clients. If an attorney for a party fails to appear at a pre-trial conference, the pre-trial judge may act as in the case of a non-appearance for trial.

(b) The matter of a settlement may be discussed at the pre-trial conference, but the discussion shall not be made part of the court record and shall not be mentioned in the order entered on the pre-trial conference.

RULE 18—The Pre-Trial Order

(a) The judge shall make an order which shall recite the action taken at the conference, to which order the attorneys shall affix their signatures with respect to the stipulations and agreements set forth in said order. The order when entered shall control the subsequent course of the action unless modified by the pre-trial judge, or by the trial judge, to prevent manifest injustice.

(b) The pre-trial order shall cover such of the items in the following form as may be appropriate, subject to such additions and modifications as the pre-trial judge may deem advisable:

(Caption)

The parties to this action or their attorneys having appeared before the Court at a pre-trial conference pursuant to Rule of Civil Procedure 16, the following action was taken:

1. It is ordered that the following amendments to the pleadings are allowed:

2. The parties agreed that the trial of this action shall be based upon the pleadings as amended, except that the following issues raised by the pleadings are abandoned:

.....

3. The parties stipulated the following facts: .....

.....

4. The parties agreed that the following documents, which were marked for identification, may be received in evidence: .....

.....

5. The parties agreed to limit the number of expert witnesses as follows: .....

.....

6. The parties agreed that the following are all of the claims for damages or for other relief, in this action, as of the date of this conference: .....

.....

7. The parties also agreed on the following matters:

.....

8. The issues to be tried are formulated by the court as follows: .....

.....

9. Briefs on the questions of law are to be filed with the clerk and copies furnished to opposing counsel, a week in advance of the trial.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

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Docket No. _____

Calendar No. _____

On _____ the parties to this action or their attorneys having appeared before the court at a pre-trial conference pursuant to Rule of Civil Procedure 16, the following action was taken:

1. IT IS ORDERED that the following amendments to the pleadings are allowed:

2. The parties agreed that the trial of this action shall be based upon the pleadings as amended, except that the following issues raised by the pleadings are abandoned:

3. The parties stipulated the following facts:

4. The parties agreed that the following documents, which were marked for identification, may be received in evidence:

5. The parties agreed to limit the number of expert witnesses as follows:

6. The following are all of the claims for damages or for other relief asserted by the _____ in this action, as of the date of this conference:

7. The parties also agreed on the following matters:

8. The issues to be tried are formulated by the court as follows:

6

Office - Supreme Court, U. S.
FILED
MAR 27 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952
No. 625

FELIPE FERNANDEZ,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

EUGENE UNDERWOOD,
Counsel for Respondent,
27 William Street,
Borough of Manhattan,
City of New York.

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IN THE

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No.

FELIPE FERNANDEZ,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit appears at R. 155 * and is reported at 200 F. (2d) 414.

Jurisdiction

The jurisdictional requisites are set forth in the petition.

* The record filed includes the appendix to plaintiff-appellant's brief in the Court of Appeals (pp. 1-223), the appendix to defendant-appellee's brief (pp. 1a-154a) and the proceedings in the Court of Appeals (pp. 155-165). "P. App." and "D. App." will be used herein to designate pages of the respective appendices and "R." to designate pages of the proceedings in the Court of Appeals.

Questions Presented

Whether, in a seaman's action for personal injuries, in which the issues of liability have been limited by a pre-trial order pursuant to Rule 16 of the Federal Rules of Civil Procedure to those raised by plaintiff's allegations of negligence, it is error for the trial court to decline to submit to the jury an issue of unseaworthiness where plaintiff has not requested modification of the pre-trial order?

If so, whether, in the circumstances of the present case, petitioner was prejudiced by the trial court's refusal to submit to the jury the question of unseaworthiness?

Rules Involved

Rule 16 of the Federal Rules of Civil Procedure reads as follows:

> "Rule 16. Pre-Trial Procedure; Formulating Issues
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> (4) The limitation of the number of expert witnesses;
>
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

Calendar Rules 14-18 of the District Court for the Southern District of New York are set forth in the appendix to the petition.

Statement

Petitioner claims that on January 27, 1949, while engaged in his duties as junior engineer on respondent's vessel, he slipped and fell in a corridor or alleyway on the vessel because of an accumulation of water on the deck at that point (D. App. 26-7a, 40-2a). He claims that he then entered a doorway which gave access to a flight of steps leading down to the engine room and that he slipped and fell while descending these steps because his shoes had been made slippery by the water in the alleyway (D. App. 27a, 44-6a).

Two weeks later petitioner complained of a bloated stomach and upon examination at New York he was found to be suffering from diabetes (D. App. 97-8a).

Defendant denied the occurrence of the falls described by plaintiff, denied the existence of any dangerous accumulation of water in the alleyway and denied that such a fall as plaintiff described could have caused, or contributed to the aggravation of, a diabetic condition. There was substantial conflicting testimony on all of these issues.

After a trial lasting nine days, the trial court, pursuant to the pre-trial order which formulated the issues (P. App. 10-11), submitted to the jury the question whether plaintiff's diabetes and its after-effects were caused, or contributed to, by any dangerous accumulation of water in the alleyway negligently permitted by defendant (Charge of the Court, D. App. 127-142a). The jury returned a verdict for the defendant (D. App. 154a) upon which judgment was entered.

The Court of Appeals found petitioner's appeal from this judgment "singularly lacking in merit" and affirmed in a *per curiam* opinion (R. 155-6).

ARGUMENT

I. The trial court was right in refusing to submit to the jury the question of unseaworthiness.

The parties went to trial upon issues framed in the pre-trial order which, under the terms of Federal Rule 16, "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Plaintiff never requested such modification.

The issues formulated in the pre-trial order were limited, as the Court of Appeals held, to questions raised by the allegations of negligence (R. 155). Petitioner's attorney signed the customary stipulation at the foot of the pre-trial order (P. App. 11) and took no exception to the issues as therein formulated.

On the first day of the trial the judge clearly indicated that he considered that any issue of unseaworthiness had been eliminated from the case by the pre-trial order (D. App. 34-5a).

On the next day the following occurred:

> "The Court: Mr. Fogler, you and I have discussed, out of the hearing of the jury, this question of unseaworthiness. I thought it was perfectly well understood, in your pre-trial procedure before Judge Leibell, you had waived the issue of seaworthiness.
>
> Mr. Fogler: I am sorry, your Honor, if I gave that impression. I haven't waived it as yet.
>
> The Court: Then look at the order.
>
> Mr. Fogler: Would your Honor wish to—I looked at it last night, your Honor, after your Honor called my attention to that fact" (D. App. 61a).

At this early juncture plaintiff's counsel was fully apprised of the court's interpretation of the pre-trial order and its determination to abide by that order. If he was then dissatisfied with the order, or with the court's interpretation, he was under a duty to request that it be modified. This he did not do. In the absence of any such request the court and defendant's counsel were entitled to assume that the order as it stood continued to "control the subsequent course of the action" as provided by Rule 16.

When at the end of the trial plaintiff requested the court to charge the jury on unseaworthiness, the court properly denied the request on the ground that " • • • I deem you to be bound by the pre-trial order, which sets up only issues of negligence and as to which there was no motion made for amendment at any time" (D. App. 148a).

Thus the question whether modification of the order was required to prevent manifest injustice was never presented to the trial court. The authorities relied on by petitioner

concerning conditions justifying such modification are therefore inapposite to any question which may be raised upon this record.

None of the authorities cited by petitioner suggests that a trial court is bound to modify a pre-trial order on its own motion.

Plaintiff's reason for failing to move for modification of the pre-trial order (doubtless a desire to avoid a possible claim of surprise which might delay the trial) is of no materiality. Suffice it to say that on the present record it cannot be argued, nor does petitioner suggest, that his failure to propose such modification resulted from any misapprehension as to the effect which the trial court proposed to give to that order.

II. The pre-trial order was not ambiguous.

Petitioner argues that he was prejudiced by ambiguity of the printed form upon which the order was drawn, as well as by ambiguity in the order itself.

As to the first of these contentions, it is clear that the printed form provided under the local rules of the District Court (specimen attached to petition) is no more than a skeleton outline. Until the blanks are filled in it expresses no meaning but serves merely as an agenda for the pre-trial conference. Local Rule 18(b) contemplates such additions and modifications in the form as may be deemed advisable by the pre-trial judge (Appendix to petition, p. 4-5a).

Ambiguity in the order as drawn in the present case, it is argued, arises from paragraph 2 (P. App. 8). The printed portion of this paragraph as it appears in the form furnished by the District Court reads:

> "2. The parties agreed that the trial of this action shall be based upon the pleadings as amended, ex-

cept that the following issues raised by the pleadings are abandoned:"

The obvious purpose of this form is to record any agreement on the elimination of issues which may have been arrived at as a result of the preliminary discussion of counsel contemplated by District Court calendar rule 15(b), (Appendix to Petition, p. 3a). The absence of any such preliminary agreement does not mean that the issues affirmatively formulated under paragraph 8 of the pre-trial order must necessarily include every issue which may have been pleaded. Otherwise the task of issue-formulation would be reduced to that of attempting to paraphrase the pleadings.

The only colloquy at the pre-trial conference regarding paragraph 2 of the order was the following:

> "The Court: * * *
>
> Does the defendant wish to amend its answer in any respect?
>
> Mr. Walker: No, your Honor.
>
> The Court: Are there any special defenses tendered by the answer that are to be withdrawn?
>
> Mr. Walker: No, sir.
>
> The Court: Then under paragraph 2 I will enter the word 'none'. That is, no issue[s] presented by the pleadings are to be abandoned" (D. App. 2a).

This colloquy related solely to issues tendered by the answer and the court's final comment shows plainly that it meant only that defendant withdrew no defense which it had theretofore asserted.

By contrast to this brief treatment of paragraph 2 of the pre-trial order, the pre-trial judge and counsel took deliberate care in formulating the issues to be tried as stated under paragraph 8. Plaintiff's attorney took active part

in this extended discussion during which the grounds of liability relied on were stated with great particularity—but with no mention of unseaworthiness (D. App. 8-23a; P. App. 10-11).

Plaintiff's interpretation of paragraph 2 would render paragraph 8 of the order, the product of this extended and detailed discussion, wholly meaningless.

The effect of the Court of Appeals' decision is simply that a party who has consented to the entry of a pre-trial order limiting the issues to be dealt with at the trial, and who has failed at any time to ask for amendment of such order, is bound by its provisions. This holding is fully harmonious with the letter and spirit of Federal Rule 16 and is consistent with this Court's expression of the purpose of that rule as an adjunct of pre-trial procedure:

> "Thus civil trials in the Federal Courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman* v. *Taylor*, 329 U. S. 495, 501.

The "fullest possible knowledge of the issues" would be of little use to the court or to the parties in the conduct of the trial if these issues, after having been meticulously formulated by pre-trial order, were permitted to be varied during the course of the trial without the formality of modifying the order.

Other courts have consistently recognized the legal effect of pre-trial orders under Rule 16 as controlling the course of the action:

> *McCarthy* v. *Lerner Stores Corporation*, 9 F. R. D. 31, (D. C., D. of C.);
> *Barry* v. *Reading Co.*, 3 F. R. D. 305 (D. C. N. J.);

Wallar v. *Southern Pacific Co.*, 37 F. Supp. 475, (N. D. Cal.);
Fowler et al. v. *Crown-Zellerbach Corporation*, 163 F. 2nd 773, (9 Cir.);
Bryant v. *Phoenix Bridge Co.*, 43 F. Supp. 162, 164, (D. C. Me.);
Burton v. *Weyerhaeuser Timber Co.*, 1 F. R. D. 571, (D. C. Ore.);
King v. *Edward Hines Lumber Co.*, 68 F. Supp. 1019 (D. C. Ore.);
cf. Jenkins v. *Divine Foods Inc.*, 3 N. J. 450, 7 A. 2nd 736.

III. Petitioner was not prejudiced by the exclusion of issues of unseaworthiness.

Petitioner's contention was that on or about January 27, 1949 he fell and sustained injury on respondent's vessel because an alleyway was in a wet and slippery condition (P. App. 10-11). Proof of this contention was essential to plaintiff's recovery.

Unseaworthiness could have been material only if it had resulted in an accumulation of water in the alleyway at the time and place at which plaintiff claimed to have fallen. Under the evidence, and under the charge as given, the jury could not have found that such a condition existed without reaching the conclusion that the ship's officers were negligent in permitting it to exist.

The ship's master, defendant's witness, testified:

> "Q. If there were accumulations of water, either on the port alleyway or the starboard alleyway, that came from the galley, those accumulations, according to your custom, experience and rules aboard ship, should have been cleaned up, is that right, Captain? A. Yes, sir. * * * " (D. App. 24a).

The chief engineer testified that if such an accumulation of water existed it would have been his responsibility or that of the steward's department to have it cleaned up (D. App. 96a).

In the light of this evidence offered by defendant it is clear that nothing turned on whether defendant was chargeable with knowledge of the dangerous condition claimed, if it existed. Therefore, whether the question was presented in terms of the duty of seaworthiness, or of the duty of reasonable care to afford plaintiff a safe place to work, made no practical difference.

The court did not suggest that the jury might absolve defendant of the charge of negligence even though it should find that a dangerous accumulation of water existed. It indicated in its charge that the question to be determined was "whether the defendant in this case was negligent in the housekeeping of that ship to the extent that conditions there permitted water to be there on the night in question" (D. App. 134a).

Further in the charge the court said:

> "If you find, from all the evidence, that the plaintiff, by the required degree of proof, has sustained his burden, that he got his fall in the way that he says he got it, and that as a direct result of that fall he sustained the condition in which he is now, all those things that I told you, if you find that, then you come to the question of damages" (D. App. 137a).

Plainly the sense of this charge was that the claim of negligence would be sustained if the jury found that plaintiff "got his fall in the way that he says he got it".

As the trial judge put it:

> "I think the defendant would be responsible if there was water there. That is the reason I have

charged them that way. That is the important thing, the presence of water'' (D. App. 145a).

Petitioner states (petition p. 3) that:

> ''The defense to both causes of action [negligence and unseaworthiness] is almost the same, i. e., the drain was in good or seaworthy condition and water went down the drain, and no water accumulated.''

Conversely the essentials of the cause of action on either theory, negligence or unseaworthiness, were substantially the same. The jury, having exonerated defendant from the charge of negligence in permitting water in the alleyway, could not consistently have found defendant's vessel unseaworthy because of water in the alleyway. It necessarily follows that plaintiff could not have been prejudiced by the court's submitting the issues to the jury without employing the ''unseaworthiness'' rubric.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Respondent.

New York, N. Y.
March 24, 1953.